PARTICIPATION OF THE EXECUTIVE IN LEGISLATION [1]

E. M. SAIT

Assistant Professor of Politics, Columbia University

THE impression seems generally to prevail that during the last generation representative assemblies have declined in popular regard, and that the high confidence once reposed in them has given way to doubt and disillusionment. This change may be observed in France; it may be observed to some extent in England; but nowhere else has the legislature sunk so low in public esteem as in our American states. Contempt is expressed openly in the newspapers and reflected in the endless limitations upon legislative power which the constitutions impose. As each session ends, a universal sigh of relief shakes the atmosphere, and men go about estimating the extent of the damage.

No such phenomena are to be observed across the border, in the Canadian provinces. Criticism there may be, but no contempt. Why should the legislature be still respected in Ontario (let us say) and regarded with profound distrust in New York? In part, no doubt, the ballot explains the difference. In Canada, with a short ballot, the elector knows the candidates and votes effectively; in New York, on November 3, when both houses of the legislature were chosen, thirty-three other offices had to be filled in some districts. But another explanation seems to me quite as fundamental. In Ontario, as in England or France or Italy, the executive has assumed a position of recognized leadership and responsibility in the legislature. The prime minister, during his term of office, occupies a place of power tempered only by searching criticism and complete publicity. And when election-time comes, the people inquire: "What were the pledges which this man

[1] Read at the meeting of the Academy of Political Science, November 19, 1914.

made when we chose him to lead us? How faithfully has he discharged the trust?" If they are satisfied, they keep him in his place; they may keep him there for ten or twenty years; and as long as he is there the legislature must obey him.

Here in our states, though only in a half-conscious, tentative fashion, the advantages of executive leadership are coming to be recognized. Has not the governor been elevated into a kind of tribune of the people? Is it not tolerably well understood that, while our legislators, bound to the service of their little districts, do not lead or represent the people of the state, the governor does—just as the prime minister does—and that through him the people must find a way to control and formulate public policy? But though much is expected of the governor in the way of performance, relatively little has been done to strengthen his legal position. His power has developed mainly with the accumulation of precedent and the growth of custom. He must proceed to his task satisfied that moral support will be forthcoming from the people of the state and yet forced to rely on indirect and half-questionable methods to gain his ends. If we concede to the governor the message and the veto, if we thus recognize him as an integral part of the legislature, why should we make the exercise of his legislative functions so difficult and uncertain? The message, implying the right of initiative, and the veto, implying the right of amendment, must be reinforced with further specific authority if the actual power of the governor is to correspond with the power which the people evidently expect him to wield. Is it fair to demand leadership and then refuse the means of persuasion or compulsion which are necessary to its effective exercise?

What practical and immediate changes might be made in existing practice without the danger of dislocating governmental machinery or incurring the charge of leze majesty?

First as to the message. Would it not receive new force and dignity if delivered orally before both houses in joint session? Would it not make a stronger impression both upon the legislature and upon the constituencies outside? The experience of President Wilson and Governor La Follette indi-

cates that it would. This practice might very properly be regulated by the constitution.

The message is only a general statement of what the executive proposes. The details have still to be worked out. If left to its own devices, the legislature may, through lack of information and through lack of prolonged consideration, devise an inadequate bill; or it may, with the intention of throwing discredit on the proposal, embody in the bill objectionable features. The message, therefore, should be followed by the submission of bills drafted by the governor and heads of departments (who should be his appointees, of course) with or without assistance from members of the legislature. It is true that under present conditions administration bills are occasionally submitted and that the practice is becoming more frequent. But until the practice is applied in every case, and with public knowledge, responsibility as between the governor and the legislature will be difficult to place.

This initiative of the governor should be exclusive as to some matters and concurrent as to others. He alone should frame money bills; and the legislature, while free to reduce the proposed grants, should not be permitted to increase them or to alter their destination. This is the system which prevails in England and in the self-governing colonies, and which has proved such an effective check upon log-rolling and extravagance. It is substantially the system which prevails in New York city. Under such an arrangement the legislature still retains the power of the purse, the right to refuse supply, and is at the same time saved from its besetting weakness. No other way has been found to prevent raids upon the treasury or definitely to fix responsibility for expenditures.

In other matters the initiative may well rest equally with the governor and the legislature. But there are obvious reasons why the administration measures should have precedence over all other business in both houses. This is no new suggestion. It was advocated by Governor O'Neal, of Alabama, and others at the conference of governors last year. It has been adopted as a rule of the Illinois house of representatives. Under that rule an administration measure may be

sent to the appropriate committee or, on the request of the introducer (who may have reason to distrust the committee), to the committee of the whole house; and, when reported, the bill has precedence over all other business except supply.

But a concurrent initiative, even coupled with a right to prior consideration, would not strengthen the hands of the governor sufficiently. The committees may refuse to report his bills, or the legislature may incontinently reject them. It happened so in Illinois. What then? Of course the governor is at liberty to spread his gospel from end to end of the state if he can. But though he may convert a good many people, he may fail to convert the legislature—as Governor Hughes found in the case of his direct-primary bill. Could not the matter be settled by a popular vote? It has been suggested that, in case of deadlock, a referendum might be had upon the governor's proposal.

The referendum clearly affords a possible solution. In the western states it is considered as something in the nature of a universal remedy. And what more natural than to have the governor and legislature submit their differences to arbitration by the common source of their authority? But there are objections to the referendum. First of all, it places a further burden upon an already overburdened electorate and adds a further complication to our already complicated political machinery. Moreover, the issue would be laid before the people, as Mr. Stimson has remarked, without the face-to-face debate, the cross-examination, the asking of awkward questions which would be possible if the governor and his cabinet were admitted to the floor of both houses. The governor, taking advantage of his position as popular leader, might assail the obstructionists; and they might answer, not openly, but by means which experienced politicians know how to employ. And finally, while the particular subject of disagreement might be settled, the referendum would have had no direct influence in correcting the evils which have gone so far in discrediting the legislature. By use of the referendum the popular will may be vindicated in a particular instance, though with tremendous expenditure of energy. But how much will this accomplish in rehabilitating representative assemblies?

Another proposal has been made, and with increasing frequency of late—that the governor and his cabinet should be permitted to appear in both houses not only to explain and defend administration measures, but also to answer questions relative to public business. Under an Oregon plan, defeated by the voters in 1912, it was even proposed to seat defeated candidates for the office of governor as leaders of the opposition. In any European country to-day it would be regarded as absurd to exclude the executive from free intercourse with the legislature. Nor in the minds of the Fathers was the separation of powers such a rigid thing as its exponents would have us believe to-day. Madison, showing in the *Federalist* how impossible the complete isolation of the departments is, cites the case of New Hampshire, where the doctrine of separation was laid down and the chief executive nevertheless elected by the legislature, made a member of the senate with the right to vote, and advised by a council composed of members of the legislature. Practice under our first two Presidents sanctioned the appearance of cabinet officers in Congress; and since the Civil War, committees, of distinguished personnel, have twice recommended that these officers should be allowed to participate in debates and that they should be compelled to appear for the purpose of answering questions. President Taft, after the close of his administration, endorsed this recommendation strongly, as did his Secretary of War, Mr. Stimson. And why not? Is there some peculiar condition in American government which relieves it from all the necessities taught by European experience? Have our legislative bodies been so successful, relatively to others, that we alone can continue to walk in the steps of Montesquieu? To be accurate, we are not even walking in his steps; for whatever misconception Montesquieu had about the executive power in England, he at least knew that the ministers sat in Parliament and were members of Parliament and led it with a strong hand.

And consider what advantage would proceed from the presence of the governor and his cabinet in the legislature, even without the right to vote. Consider the improvement in ad-

ministration. For the state engineer and the state treasurer (this may recall recent events!) it would be a perpetual grand-jury proceeding, with searching and pertinent questions which they could by no means evade. Constantly subject to criticism, the department heads must be men familiar with legislative ways and able to defend themselves in debate. They must always be alive to the duties of their offices. As the Hon. Samuel W. McCall remarks with regard to the national government, it would no longer be possible to appoint a mediocre lawyer as attorney general.

And consider the inevitable improvement in legislation. No one can doubt that the governor would assume a far more important rôle in this direction; he would present a coherent program which the electorate could fairly judge on its merits because debate would take a higher level and attract public attention in a new way. The members would be infinitely better informed, because openly and of right they could ask for information from the heads of departments and be sure of getting a direct and straightforward reply. The personnel would be greatly improved. Remember that in view of the new position of cabinet officers only men of previous experience in the legislature would eventually be appointed; that good men would come into the legislature and stay there with the expectation of receiving such an appointment; and that the minority party would therefore have at its disposal men who had held or expected shortly to hold cabinet office and who could take an authoritative part in debate. With competent, recognized leaders on both sides—like the front benches in the Commons—opposing arguments would be cogently presented for the legislators and the voters to weigh. It is also probable that the leadership of the governor and cabinet, representing the people of the whole state, would extinguish that all-pervasive subservience to local interests which is so generally decried. Better still, new members, coming up full of good intentions, would find reputable leaders to follow and would no longer have to choose between being relegated to oblivion and accepting affiliations which their conscience could not approve.

And what are the objections to this closer association of executive and legislature? Like the objections to the short ballot they are rather elusive and not always rational when discovered. Governor Spry, of Utah, justified his opposition by saying:

> I may be a reactionary. I plead guilty to being one. . . . I am simple enough to believe that those men were inspired when they wrote the Constitution of the United States. I believe that the Constitution was given to this Republic as an anchorage, and I pray God sincerely that the Republic may never go so far away from the Constitution as to be considered to be drifting from its moorings, because if it does we are liable to go out at sea and drift upon the rocks and go to pieces.

This is the kind of argument which was used in justifying the rotten boroughs of England. Strictly speaking, it is not argument at all. What then do the more or less rational opponents of executive leadership say? Nothing more damaging has been said than that the independence of executive and legislature would be endangered. Perhaps so; personally I view the danger with profound indifference. Separation of powers, though a time-honored theory of American government, is now worn pretty thin, especially in our cities; and theory never counted for much beside practical expediency among men of solid political sense. But there are people, apparently, who would rather see representative assemblies perish from the face of the earth than have their cherished doctrine for one moment under partial eclipse.